BAR COUNCIL

v.

DATUK V KANAGALINGAM

FEDERAL COURT, KUALA LUMPUR
CHONG SIEW FAI CJ (SABAH & SARAWAK)
[CIVIL APPEAL NO: 02-20-97(W)]
3 JULY 2000

CIVIL PROCEDURE: *Costs - Taxation - Review of award - Whether award excessive - Whether sum awarded based on principles - Whether discretion properly exercised - Whether award proportionate with complexity of case*

The Federal Court dismissed the appellant's appeal and ordered the appellant to pay costs to the respondent. Taxation of the costs went before the deputy registrar. The appellant objected to the respondent's claim for getting-up of RM1 million. The deputy registrar scaled the claim and awarded RM600,000. During the review of taxation hearing, the appellant argued that the amount of getting-up fee allowed was excessive given the simplicity of the case. Moreover, the deputy registrar did not give any reason as to why the award was considered reasonable and appropriate nor did she state the principles relied on in granting the award.

Held:
Per Chong Siew Fai CJ (Sabah & Sarawak)

[1] The deputy registrar had failed to address her mind to any principles or give any reasons in arriving at the sum of RM600,000 as getting-up fee and hence had failed to exercise properly the discretion conferred upon her.

[2] The absence of reasoning coupled with the award of such a high sum had placed this case within the category of exceptional cases meriting a review of the decision.

[3] Although the matter was of considerable importance in that the livelihood and professional reputation of the respondent was in jeopardy, the getting-up fee of RM600,000 was exceedingly high and out of proportion with the magnitude and complexity of the case. Thus, to allow such a figure to stand would be an undesirable and unhealthy precedent for future cases.

[Application allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Mahkamah Persekutuan menolak rayuan perayu dan memerintahkan perayu membayar kos kepada responden. Penetapan kos didengar oleh penolong pendaftar. Perayu membantah tuntutan responden untuk penyediaan guaman sebanyak RM1 juta. Penolong pendaftar mengurangkan tuntutan dan memberi award sebanyak RM600,000. Semasa perbicaraan kajian semula penetapan kos, perayu menghujah bahawa jumlah fee penyediaan guaman terlalu berlebihan dibandingkan dengan kerumitan kes ini. Tambahan pula, penolong pendaftar tidak memberi sebarang alasan kenapa award tersebut dianggap munasabah dan wajar serta beliau juga tidak menyatakan prinsip yang digunapakai dalam memberi award tersebut.

Diputuskan:
Oleh Chong Siew Fai HB (Sabah & Sarawak)

[1] Yang arif penolong pendaftar gagal menumpukan mindanya kepada sebarang prinsip ataupun memberi sebarang alasan untuk sampai ke jumlah RM600,000 sebagai fee penyediaan guaman, maka dari itu, beliau telah gagal menggunakan budibicara yang diberikan kepadanya.

[2] Ketiadaan alasan dan juga nilai award yang tinggi menempatkan kes ini dalam kategori kes istimewa yang keputusannya patut dikajisemula.

[3] Walaupun perkara ini agak penting kerana mata pencarian dan reputasi profesional responden terancam, fee penyediaan guaman sebanyak RM600,000 adalah terlalu tinggi dan tidak seimbang dengan pentingnya dan rumitnya kes ini. Dari yang demikian, dengan membenarkan angka tersebut akan menyebabkan satu duluan yang tidak diingini dan tidak sihat untuk kes-kes di masa hadapan.

[Permohonan dibenarkan.]

Case(s) referred to:
Ayer Molek Rubber Co Bhd & Ors v. Insas Bhd & Anor [1995] 3 CLJ 359 ***(refd)***
Chin Cham Sen v. Foo Chee Sang & Anor [1952] 18 MLJ 99 ***(refd)***
Co-Operative Central Bank Ltd v. Tan Nyap How [1997] 4 MLJ 568 ***(refd)***
Dato' Param Cumaraswamy v. MBf [1998] 1 CLJ 1 ***(refd)***
Diversey (Far East) Pte Ltd v. Chai Chung Ching Chester & Ors (No 2) [1993] 1 SLR 542 ***(refd)***
Gelombang Sepadu Sdn Bhd v. Tal Seng Enterprise Sdn Bhd [1999] 1 CLJ 627 ***(refd)***
Insas Bhd & Anor v. Ayer Molek Rubber Co Bhd & Ors [1995] 3 CLJ 328 ***(refd)***
Pengkalen Holdings v. Dato' V Sivaparanjothi (unreported) ***(refd)***
Tuan Hj Ishak Ismail v. Leong Hup Holdings Bhd & Other Actions [1996] 1 CLJ 393 ***(refd)***

United Malayan Banking Corporation v. Syarikat Perumahan Luas Sdn Bhd [1991] 1 CLJ 594 ***(refd)***
White v. Altrincham Urban District Council [1936] 1 All ER 923 ***(refd)***

Legislation referred to:
Rules of the Federal Court 1995, r. 3
Rules of the High Court 1980, O. 59 r. 36(1), (4), (5)

For the appellant - Sulaiman Abdullah (Anita Sockalingam with him); M/s Zain & Co
For the respondent - R Thayalan; M/s V Siva & Partners

[Appeal from High Court, Kuala Lumpur; Civil Appeal No: 17-73-1996]

Reported by Izzaty Izzuddin

JUDGMENT

Chong Siew Fai CJ (Sabah & Sarawak):

This review of taxation arose by way of a summons dated 28 July 1999 filed by the appellant objecting to the sum RM600,000 as fee for getting-up awarded by the learned deputy registrar of the Federal Court to the respondent. Before going into the merits of the application, I would endeavour to lay out the factual background as follows.

Background Facts

It started with the respondent acting as counsel for one Insas Bhd. and another (plaintiffs) in a High Court case against *Ayer Molek Rubber Co. Bhd. and Ors. (defendants) (unreported).* The respondent obtained for his client an *ex parte* interlocutory injunction which, *inter alia*, ordered the 11th defendant to effect registration of 540,000 ordinary shares of the Ayer Molek Rubber Co. Bhd. **in** the plaintiffs' names and further to restrain some of the defendants, whether by themselves, their servants and/or agents from interfering/interrupting with the aforesaid registration. The defendants then filed a motion in the Court of Appeal for stay of the said *ex parte* injunction. The Court of Appeal in its judgment made certain remarks on or censure the handling of the case by the plaintiffs' "legal advisers", Messrs V.K. Lingam & Co. It also granted an interlocutory injunction to the defendants restraining the plaintiffs from exercising any rights attached to the shares pending disposal of the appeal by the Court of Appeal. (see *Ayer Molek Rubber Co. Bhd & Ors v. Insas Bhd & Anor* [1995] 3 CLJ 359). The plaintiffs then applied to the Federal Court for leave to appeal against the order of the Court of Appeal and at the same time they also requested that the criticism or censure made by the Court of Appeal in its judgment be expunged, which the Federal Court did. (see *Insas Bhd. & Anor v. Ayer Molek Rubber Co. Bhd. & Ors* [1995] 2 MLJ 833 at 845.)

Despite the expunging of the remarks by the Federal Court, the appellant proceeded lodging a complaint to its disciplinary board to investigate into the remarks made by the Court of Appeal against the respondent. The disciplinary board was convened but decided that no case be pursued against the respondent. Being dissatisfied with the decision of the Board, the appellant appealed to the High Court. The High Court dismissed the appeal. The appellant then appealed to the Federal Court against the High Court's decision. Again the appellant lost. The Federal Court dismissed the appeal and ordered the appellant to pay costs to the respondent.

Taxation of the costs went before the said deputy registrar. The only objection taken by the appellant was the respondent's claim for getting-up of RM1 million, which the learned deputy registrar scaled down to and awarded RM600,000. She maintained the award upon review on application by the appellant. The appellant then filed this summons which came before me.

The Arguments

Basically, the argument for the appellant was that the amount of getting-up fee allowed was far too excessive given the simplicity of the case as evidenced by the fact that the Federal Court did not even require the respondent's counsel to submit; nor did it give any written judgment, and had allowed the respondent costs for only one counsel. It was also submitted that in her written judgment, the learned deputy registrar did not give any reason as to why the award of RM600,000 as getting-up was considered reasonable and appropriate, nor did she state the principles relied on in granting the high award. Accordingly, it was contended, there had been a failure to exercise the discretion properly in making the award. Counsel urged to be considered the element of public interest which, it was submitted, required the appellant to be fearless in referring complaints of conduct of advocates to the disciplinary board and not be burdened by exorbitant costs should the appellant lose its case in a court of law. It was contended that costs should not be awarded against the appellant which was merely carrying out its role as a defender or custodian of the public interest in ensuring that members of the legal profession be above-board in their conduct and dealings with their clients, but that if costs had to be awarded, the element of public interest must be considered when deciding the quantum.

For the respondent, counsel referred to the principles of law governing taxation and the judge's power on review of the decision of the taxing officer. Counsel contended that the learned deputy registrar had taken into account all the material facts, the issues in the appeal, and the extensive arguments submitted by the parties before her, and suggest that, therefore,

I should refrain from interfering with her exercise of the discretion. Counsel argued that the getting-up fee allowed was not excessive and was necessary and proper for the attainment of justice and for enforcing and defending the rights of the respondent. It was further submitted that, more importantly, the appeal in the Federal Court had raised several novel and complex issues and questions of importance which counsel identified, *inter alia*, as:

(i) whether the appellant could lodge a complaint to the Legal Professional Disciplinary Board on the conduct of a solicitor based on remarks made in a judgment; and

(ii) whether the appellant could lodge a complaint to the said Board on the conduct of a solicitor based on remarks in a judgment that has been expunged by the Federal Court;

The respondent further submitted that the charges against him were grave and serious, contrived to destroy his professional career and livelihood, and therefore he must be fully prepared to defend himself before the Federal Court as best he could on all issues since he could not predict how the Federal Court would want the appeal to be argued. For the respondent it was also submitted that in preparing for the case, trips had been made to London and Singapore for research purposes and the appointment of a Queen's Counsel was considered necessary to ensure a thorough preparation of the case since the appeal would have a serious bearing on not only the livelihood, character, and reputation of the respondent but also those of his family and employees. The consequences therefore were wide and far reaching.

The Law

I shall now deal with some of the matters that may be considered by the registrar in allowing the amount of costs for an item, and also the law on a review of taxation by a judge.

Amongst the matters that the registrar may have regard to on taxation include the complexity of the cause or matter, the importance of the cause or matter to the respondent, the skill, specialised knowledge and responsibility required of, and the time and labour expended as well as other fees or allowances payable in respect of other items in the same cause or matter. (See O. 59 Appendix I Part X para. 1(2) of the Rules of the High Court 1980).

Having regard to r. 3 of the Federal Court Rules 1995, O. 59 r. 36 of the Rules of the High Court 1980 is applicable. Rule 36(1), (4) and (5) thereof provides:

> (1) Any party who is dissatisfied with the decision of the Registrar to allow or to disallow any item in whole or in part on review under rule 34 or 35, or with the amount allowed in respect of any item by the Registrar on any such review, may apply to a Judge, for an order to review the taxation as to that item or part of an item, if, but only if, one of the parties to the proceedings before the Registrar requested the Registrar in accordance with rule 35(3) to state the reasons for his decision in respect of that item or part on the review.
>
> (2) ...
>
> (3) ...
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> (4) Unless the Judge otherwise directs, no further evidence shall be received on the hearing of an application under this rule, and no ground of objection shall be raised which was not raised on the review by the Registrar but, save as aforesaid, on the hearing of any such application the Judge may exercise all such powers and discretion as are vested in the Registrar in relation to the subject matter of the application.
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> (5) On an application under this rule the Judge may make such order as the circumstances require, and in particular may order the Registrar's certificate to be amended or, except where the dispute as to the item under review is as to amount only, order the item to be remitted to the Registrar for taxation.

Although paras. (4) and (5) above give wide latitude to the judge in reviewing taxation done by the registrar, case law shows that a judge reviewing taxation ought not to disturb the decision of the registrar arbitrarily. Following the principles laid down by the courts in England, the law in Malaysia pertaining to review of taxation by a judge is not to interfere with the costs awarded by the registrar (ie, on quantum) unless it can be shown that the registrar has erred on a question of principle or has taken into account irrelevant considerations in arriving at his decision. (see for example, *Chin Cham Sen v. Foo Chee Sang & Anor* [1952] 18 MLJ 99; *United Malayan Banking Corporation v. Syarikat Perumahan Luas Sdn. Bhd.* [1991] 1 CLJ 594; and *Co-operative Central Bank Ltd v. Tan Nyap How* [1997] 4 MLJ 568.)

In *White v. Altrincham Urban District Council* [1936] 1 All ER 923, Slesser LJ said (pp. 926 and 927):

> In my opinion, the judge had no power to disturb the discretion of the registrar expressly given him by the rule on a mere question of quantum unless the registrar has purported to exercise that discretion in a way not warranted by law. That such a view had long been held in proceedings in the High Court cannot be disputed. In *Alson v. Lord Oxford* [1833] 1 My & K564 at pg. 566, Sir John Leech, MR, said:

> Generally speaking, the decision of the master on taxation is final: he is the sole judge of the fact whether the business had been done, and of the proper charge to be made for it; ... the court will only interfere where the master acts upon some mistaken principle.
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> Of cases since the Judicature Act, it is sufficient to cite Buckley LJ in *Ogilvie* [1910] P.243 at page 245, quoted with approval by Swinfen Eady LJ in *Slingsby v. A.G.* [1918] P.236 at page 239, to the effect that:
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> On questions of quantum the decision of the taxing master is generally speaking final. It must be a very exceptional case in which the court will even listen to an application to review his decision.

In the Singapore case of *Diversey (Far East) Pte Ltd v. Chai Chung Ching Chester & Ors (No. 2)* [1993] 1 SLR 542 CA Rajendran J, delivering the judgment of the court said (p. 552):

> The judge should not interfere with the registrar's decision unless there is an error of principle or some other material error. The dicta of Aitken J in *Kana Moona Syed Abu Bakar* [1940] MLJ 4 to the effect that a judge would be justified in interfering where the registrar's decision was 'an affront to reason and common sense' is, in our opinion, too harsh a standard to apply. What is required is a broad overview of the matter by the judge and if there is an error in principle or some other material error, he will be justified in interfering with the decision below.

(See also *Gelombang Sepadu Sdn. Bhd v. Tal Seng Enterprise Sdn Bhd* [1999] 1 CLJ 627 where *Re Ogilvie, supra,* and *Diversey (Far East) Pte Ltd., supra* were referred.)

On the authorities, it is clear that in exceptional cases where it can be shown that wrong principle was applied, or there is some other material error, the judge upon review can set aside or amend the award on quantum.

The Review

I am inclined to accept the complaint of the appellant that the learned deputy registrar had failed to address her mind to any principles or give any reason in arriving at the sum of RM600,000 as getting-up fee and hence had failed to exercise properly the discretion conferred upon her. Although the arguments of counsel for both sides were neatly laid out in her judgment, nowhere therein was it stated that the factors put forth had been accepted or rejected. In the circumstance, I am constrained to re-examine the facts of this case, being of the view that the absence of such reasoning and the award of the high sum place this case within the category of exceptional cases meriting a review of the decision of the learned deputy registrar. In so doing, my main consideration is whether there is sufficient

material or evidence upon which the learned deputy registrar had arrived at her decision and not whether I, in my appellate capacity, would have come to the same conclusion. The whole of the facts had to be looked at, not for the purpose of considering what my own conclusion of facts might be, but for the purpose of seeing whether there is material or evidence upon which the learned deputy registrar could arrive at her conclusion.

Taking into account all the factors, and having regard to the cases cited above, I am of the opinion that this is a case justifying interference. The getting-up fee of RM600,000 is exceedingly high and out of proportion to the magnitude and complexity of the case. To allow such a figure to stand would cause undesirable and unhealthy precedent for future cases.

In contrast to the contention of the appellant that this was just a case involving simple issues with no difficult points of law requiring special skills involved, I consider it a matter of considerable importance in that the livelihood and professional reputation of the respondent was in jeopardy. The respondent was therefore entitled to pursue his case to the full and to leave no stones unturned, even to the extent of appointing Queen's Counsel, consulting expert or making researches overseas, to protect or restore his reputation and image in the eyes of his peers and the public even though the matter was at the inquiry-committee stage. On the same reckoning, I could not be persuaded to treat the question of costs awarded as if it were only ordinary costs given in a summary judgment application.

On the facts and circumstances of this case, and having regard to *Tuan Hj. Ishak bin Ismail v. Leong Hup Holdings Bhd and Other Actions* [1996] 1 CLJ 393; *Pengkalen Holdings v. Dato V Sivaparanjothi (unreported)* Court of Appeal Civil Appeal No. 02-688-97; *Dato' Param Cumaraswamy v. MBf* [1998] 1 CLJ 1, I would reduce the quantum awarded to RM120,000.

Accordingly, the application for review is allowed, the getting-up fee of RM600,000 is hereby reduced to RM120,000. Likewise the allocatur would correspondingly be reduced with the calculation thereof be left to the registrar.